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Mareon Craick, and Homer Maxuel her Husband,
Against

Sir Robert Laurie of Maxuelton.

THE said *Mareon Craick* and her Husband obtained an Decreet upon the 22 of October 1692 Years, before the Sheriff of *Drumfrees*, against *John Craick* of *Stewartoun*, Father to the said *Mareon*, for payment making to her and her said Spouse for his Interest, of the Sum of 4000 *lib.* with Annualrent since September 1691; and in time coming, and that as the Provision due to her by the Contract of Marriage, betwixt her said Father and umquhile *Sophia Douglas* her Mother: And likeways to relieve her, as one of the Heirs of the said Marriage, of all Incumbrances that may overtake her as one of the Heirs of the said Marriage, and all Damage she may sustain therethrough, there being no Heirs-male, conform to an other Obliegement in the said Contract of Marriage, betwixt her said Father and Mother, and whereupon there was an Adjudication led against *Stewartoun's* Estate, for Implement of both Conclusions, with Letters of Inhibition and all other necessary Diligence.

Mareon Craick and her Husband, having pursued a Process for mails and Duties, against the Tennents of the Lands adjudged; Compearance was made for *Sir Robert Laurie of Maxuelton*, who had bought *Stewartouns* lands, after the said Diligence used by the pursuers, and after that *Stewartoun* himself was become notoriously Bankrupt; For whom it was Alledged, That *Homer Maxuel* nor his Spouse could not Found upon the Adjudication, in regard the same belonged to *Maxuelton*, in far as *Maxuelton* having bought the Lands adjudged, he payed 1000 *merks* of the Sum, contained in the Adjudication, to the Pursuers, at which time, it was agreed betwixt *Maxuelton* and them, That they should dispoise and assign their Adjudication in Favours of him, and that he should pay to them the rest of their money; In order whereunto, there was a Disposition drawn by *Homer Maxuel's* own Lawyers, which he and his Wife were to grant to *Maxuelton*, and *Maxuelton* being pleased with the Draught, he sent 5000 *merks* to *Drumfrees*, which was the remainder of the money, upon the

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day of May last. to be payed to *Homer Maxuel*, and (which money was counted and received by him, and put in his own Purse, and sealed with his own Seal: and by his consent was Consigned in the Hands of *John Herreis* of *Buffs*, to be delivered up to *Homer Maxuel* the next day, at which time he was to bring his Wife to *Drumfrees* to subscribe and ratifie the Disposition: But in stead of subscribing the Disposition, he refused so to do, and made some amendments thereupon, albeit it was drawn by his own Lawyers, as said is; Whereupon *Maxuelton*. at least *Freershaw* his Procurator in his Name, Protested by way of Instrument, That he might be free of all Coast. Scaith and Damage. sustained by the Pursuers refusal to compleat the Bargain and receive their money; And in regard, that *John Herreis*, in whose hands the money was first consigned, kept a Publick House, he thought it not safe to leave the money with him, but consigned the same of new again, in the hands of *John Sharp* of *Hoddon*, where they judged it might be more secure, and the Pursuer being present, consented thereto, or at least did not contradict the same. And therefore they contend, That *Homer Maxuel* could not refile or make any new amendments upon the scroll of the Disposition, that was adjusted by Parties, Because in this case, *res non fuit integra*, in sua (as far as, *Homer Maxuel* had received 1000 merks, and had agreed to the Terms of the Disposition which he was to grant; and afterwards had counted and received 5000 merks, and put it into Bags, and was within a day or two thereafter to subscribe the Disposition, and cause his Wife do the same, and receive the money.

2. The Amendments made by *Homer Maxuel* were frivolous, for thereby he made an Reservation, That in case his Wife should be overtaken by her Fathers Creditors, as one of the Heirs of Line of the Marriage, she might have recourse against her Fathers Estate, by Vertue of the Adjudication, and other Diligence founded upon the Clause of her Father and Mothers Contract of Marriage; And this Sum contained in the Adjudication, being only a Bairns Provision, could not make her lyable to her Fathers Creditors, or at least if she were made to represent her Father thereby, That Obligation in her favours became extinct by Confusion, being both Debitor and Creditor and so could not be a Ground of Relief in her favours.

To this it was answered, denying the foresaid Representation, That the same is most irrelevant, for the Reasons following.

1. Because it appears by the Adjudication, That the Sum due to the Pursuers was 4000 lib. of Principal, and Annual rent since September 1691. besides the Expences of leading the Adjudication; And its acknowledged by *Maxuelton's* Procurators, that he had only payed 1000 merks of money, So that the 5000 merks alleadged to have been consigned, did not pay the Sum due to the Pursuers, by upwards of 1100 merks, and therefore unless it were proven by Write, That the Pursuers had restricted their Sum to 5000 merks, they had very good Reason to refuse the Sum consigned: And it is humbly supposed, that neither Instruments of Notars, nor Testimonies of Witnesses can prove the Restriction, or giving down of a Sum so well secured by real Diligence; for if that were once made a Preparative, the greatest Interest in the Kingdom might be endangered by the Assertions of Notars, or Testimonies of Witnesses, which our Law has hitherto guarded against, And its hoped Your Lordships will be tender of the Dangers and Inconveniencies that may thereupon ensue,

2. *Maxweltoun's* own Instruments bears, That all Adjudications and real Diligences upon *Steuartoun's* Estate, were to be payed out of the fore-end of the Price of the Lands: And its Admired, How he could crave, that the Pursuers should denude themselves of their Right upon 5000 *Merks* which was so far short of the Sum, as is clear by the Decreet of Adjudication, notwithstanding of the 1000 *Merks* alledged formerly payed; and seing the whole Sum due was not Configned: The Confignation is Null.

3. The Pursuers had liberty to Correct Errors, notwithstanding of any draught of a Disposition given by them to *Maxuelton* to see, and the Grounds insisted upon by *Maxuelton*; That *res non fuit integra*, in respect that the Pursuers, after they had given *Maxuelton* a Scroll of the Disposition to see, which they were to sign, had received 1000 *Merks*; And that *Maxuelton* in Faith of their promise, had sent 5000 *Merks* to them at *Whitesunday* last, which *Homer Maxuel* Compted and put in Bags upon the 15 of May last, and at that time promised, that he and his Wife should Subscribe the Disposition within a Day or two afterwards.

For *Primo*, Its denyed that the Pursuers received the 1000 *Merks*, or any Money from *Maxuelton*, either at the time that the Scroll of the Disposition was given him to see or afterwards, so that *res fuit integra*, albeit Money had been payed, before the giving of the Scroll to see.

2. As to the Pursuers Compting the 5000 *Merks* upon the 15 Day of May and putting the same in Bags and Sealing the same, *res fuit integra*; for notwithstanding thereof *Sir Robert Laurie* retained the Money, and both property and possession thereof continues with him to this Hour; For he first Configned it in the hands of *John Herreis* his own Trustee and Notar, who is Clerk to this Instrument, and afterwards took it from him, and put the same in the custody of *John Sharp* of *Hoddorn*, who was his Grand Adviser in all this Affair, as appears by his own Instrument: And no Man will pretend, but notwithstanding of the pretended Confignation, *Maxuelton* might have past therefrae, and disposed upon the Money at his pleasure; and therefore it were hard to say, that *Homer Maxuel* was sua far tyed, that he could not amend a Scroll of a Paper; and yet the other party might be free, albeit the whole Sum had been Configned, as it was not, by upwards of 1100 *Merks*.

3. As for the Compting of the Money, and putting the same in Bags, and Sealing it with the Pursuers Seal, suppose it were true as it is not, it was upon no other design, nor could have no other effect, but to save the pains of Compting it over again, in case the business happened to be settled, as may easily appear by *Maxuelton's* Trusties, their keeping the Money which is alledged to have been sealed with the Pursuers Seal; and by *Maxuelton's* taking it out of *John Herreis* hands, and putting it into *Hoddorns*, as appears by his own Instrument; It is evident, that he has looked upon himself to be owner of the Money, as truly he is.

4. As to the alledged promise, That *Homer Maxuel* made to Subscribe the Disposition, and bring his Wife to *Drumfreis* to do the same within a Day or Two afterwards.

Its Answered, That there was *locus poenitentiae*, albeit such a promise had been made as was not, especially where *res fuit integra*, and Promises being *nuda verborum emissio*, is only probable *Scripto vel Juramento*, and it were dangerous to find, that Witnesses or Instruments could prove Promises of so great an import; And Your Lordships are entreated to observe, that this Instrument

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(4)

was taken upon the 16 of May, and only narrates, that such a promise was made upon the 15 of May, So that there was no Instruments taken upon the pretended Promise.

And Lastly, though there had been a Promise, to subscribe a Right, there was *locus penitentiae* till the same was done; much more to make an Amendment; where the amendment made upon the Scroll was most rational, for this being a destination of Succession in the Pursuers Father and Mothers Contract of Marriage in favours of the Heirs Female failzieng Heirs Male, and th: Fathers Estate being adjudged, and otherways incumbered before she had done any diligence against her Father, and he being afterwards altogether bankrupt, the pursuer had reason to reserve her Adjudication, in sua far as it could have accels against her Fathers Estate, in case she should be troubled by his Creditors: For whatever the effect of that clause might be, she had no reason to pass from it, and though she were Heir to her Father as to a particular Sum destinate to her, yet the Father obleidgeing himself to make that Sum free to her. certainly that obligation makes her Creditor to her Father, and she haveing used both Inhibition and Adjudication against him, before he Disponed his Estate to *Maxuelton*, she had reason to reserve that Diligence to secure her, in case she should be troubled by her Fathers prior Creditors; and if the Reservation could do her no good, then it could do *Maxuelton* no harm.

It is farther added; that a part of the consequence of this Process being as to the want of the Annualrents, since the pretended time of Consignation, the Grounds aboverepresented are not only urged for the Pursuers: But likewise that no Consignation stops Annualrent, but such as are done by Your Lordships Authority in the Clerk of the Bills, or Sessions-hands, or where a particular person, in whose hand the Consignation is to be made, is agreed to by Parties, and in this case its denyed, that the Pursuer gave any consent to Consign the Money in the Notars hand, and the Notars own Instrument does not say it, and though it did, it cannot prove it, although it had been consented to, as it was not: yet that Consignation was past frae by the Consigners consenting to the taking the Money out of the Notars hand, and putting it in *Hodoms* hand. And it is observable that, the Instrument bears only that, *Homer Maxuel* was present, and did not contradict the uplifting of the Money out of the Notars hand, and putting it into *Hodom's*; For seing a part of the Sum was only offered, and Terms were not ended, *Homer Maxuel* thought himself not concerned how *Maxuelton* disposed upon his own Money.

In Respect whereof, The Pursuer ought to have an Decreet for Mails and Duties, at least a Day Assigned for proving his Lybel.